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7-20, 2000

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 175 F.3d 1027. The opinion on petitions for rehearing and dissenting statements on denial of rehearing en banc (Pet. App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The decision of the court of appeals was entered on May 14, 1999. Petitions for rehearing were granted in part and denied in part on October 29, 1999. The petition for a writ of certiorari was filed on January 27, 2000, and was granted on May 22, 2000. The jurisdiction of this Court is invoked under on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth in the petition appendix at Pet. App. 105a-126a. The EPA rules at issue in this case are set forth in the petition appendix at Pet. App. 102a-104a.

STATEMENT

Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, requires the Environmental Protection Agency (EPA) to establish and periodically revise, based on the latest scientific knowledge, primary National Ambient Air Quality Standards (NAAQS) "requisite to protect" public health with "an adequate margin of safety," and secondary NAAQS "requisite to protect" other public interests. On July 18, 1997, EPA issued final rules revising the NAAQS for two pollutants: particulate matter (PM) and ozone.[1] EPA decided to revise the PM and ozone standards because new scientific evidence showed that the standards then in effect were not adequately protecting millions of Americans from adverse health effects. For example, a quantitative risk assessment indicated that PM concentrations below the standards EPA established in 1987 may annually subject people in two urban areas alone, representing about five million people, to hundreds of early deaths, thousands of hospital admissions for respiratory illness, and tens of thousands of incidents of respiratory symptoms in children. See 61 Fed. Reg. 65,638, 65,650-65,651 (1996).

On petitions for review, the court of appeals held that Section 109, as interpreted by EPA in setting the revised PM and ozone standards, effected an unconstitutional delegation of legislative authority. The court remanded both rules for EPA to articulate an "intelligible principle" for determining the degree of public health protection to be afforded by the NAAQS. In addition, even though EPA had

[1] See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652 (1997); NAAQS for Ozone, 62 Fed. Reg. 38,856 (1997). Copies of the Federal Register notices have been lodged with the Clerk of the Court.

taken no final agency action to implement the revised ozone NAAQS, the court issued an opinion, later modified, interpreting the scope of EPA's implementation authority.

I. THE CLEAN AIR ACT'S NAAQS PROVISIONS

The Clean Air Act sets up a comprehensive and extraordinarily detailed program for control of air pollution through a system of shared federal and state responsibility.[2] The NAAQS are a central feature of that program. Sections 108 and 109 of the Act require EPA to establish, review, and revise nationally applicable standards for a small class of common air pollutants. 42 U.S.C. 7408-7409. The NAAQS establish permissible concentrations of those pollutants in the "ambient," or outside, air. Section 110 of the Act then calls on the States to impose controls on individual sources of air pollution as necessary to attain and maintain the NAAQS. 42 U.S.C. 7410; see *Train* v. *NRDC*, 421 U.S. 60, 78-79 (1975); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1137 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

A. Air Quality Criteria And Standards

The NAAQS-setting process begins with identification of air pollutants that are emitted from "numerous or diverse"

[2] Congress first addressed the problem of air pollution through the Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322, which authorized the Secretary of Health, Education, and Welfare (HEW) to conduct research activities. Congress later expanded HEW's authority to include, among other things, compiling and publishing air quality criteria based on scientific studies, Clean Air Act of 1963, Pub. L. No. 88-206, §1, 77 Stat. 392, 395. Congress later directed States to develop regionally based ambient air quality standards and provided mechanisms for enforcement, Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c), 81 Stat. 492-494. Congress substantially revised that program through the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679, which provided for national ambient air quality standards and for state implementation. See § 107(a), 84 Stat. 1679-1683. Congress continued to build on that program through the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. See text at p. 6, *infra*, and note 5, *infra*.

sources and that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7408(a)(1). EPA has identified six such pollutants, commonly referred to as "criteria" pollutants: sulfur oxides; nitrogen oxides; carbon monoxide; lead; ozone; and particulate matter.

EPA must develop "air quality criteria" reflecting the "latest scientific knowledge" on "all identifiable effects on public health or welfare" that may result from each criteria pollutant's presence in the ambient air. 42 U.S.C. 7408(a)(2). EPA generally records the scientific assessments constituting air quality criteria in a "Criteria Document," which provides a rigorous analysis of all pertinent scientific information. EPA also develops a "Staff Paper" to "bridge the gap" between the scientific review and the judgments the Administrator must make to set standards. See *NRDC* v. *EPA*, 902 F.2d 962, 967 (1990), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991). Both documents undergo public notice and comment, as well as extensive scientific peer-review by the Clean Air Scientific Advisory Committee (CASAC), an independent committee established under the Act to advise the EPA Administrator on air quality criteria and NAAQS. 42 U.S.C. 7409(d)(2)(B); see 62 Fed. Reg. 38,654 (1997).[3]

Relying on the "air quality criteria," EPA promulgates "primary" and "secondary" NAAQS to protect against the adverse health and welfare effects of each criteria pollutant. 42 U.S.C. 7409(a)(1) and (b)(1)-(2). EPA must set "primary" standards at levels that, "in the judgment of the Administrator," are "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. 7409(b)(1). EPA must set "secondary" standards at levels that are "requisite to protect the public welfare" from any "known or anticipated adverse effects." 42 U.S.C. 7409(b)(2).

[3] We have provided a set of the Criteria Documents and Staff Papers for PM and ozone to the Clerk of the Court.

To ensure that standards keep pace with advances in scientific knowledge, EPA must review the air quality criteria and standards every five years and revise them as "appropriate in accordance with [Sections 108 and 109(b)]." 42 U.S.C. 7409(d)(1). When setting or revising NAAQS, EPA must consider and explain any significant departure from CASAC's recommendations. 42 U.S.C. 7607(d)(3).

Drawing on legislative guidance, EPA has developed decisional criteria to ensure consistency among its NAAQS decisions. EPA considers, among other public health factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk. See, *e.g.*, 97-1440 C.A. App. (PM App.) 1908. The court of appeals approved EPA's use of those factors 20 years ago, *Lead Indus.*, 647 F.2d at 1161, and EPA has since employed them in numerous NAAQS rulemakings.[4] The court reaffirmed its approval of EPA's use of those factors in this case. Pet. App. 5a, 6a-7a.

B. Implementation Of Air Quality Standards

The CAA sets out a detailed process, resting on principles of federal-state cooperation, to ensure that the air throughout the Nation "attains" the NAAQS. Within three years of promulgating a new or revised NAAQS, EPA must "designate" areas of the country as either "attainment" (*i.e.*, the area meets that NAAQS), "nonattainment" (*i.e.*, the area fails to meet that NAAQS), or "unclassifiable" (*i.e.*, adequate information is not available). 42 U.S.C. 7407(d)(1). Following designation, EPA must establish the date by which nonattainment areas shall attain that NAAQS (*i.e.*, the area's attainment date). See 42 U.S.C. 7502(a). The CAA provides for each State to develop, for EPA's approval, a state imple-

[4] See, *e.g.*, 59 Fed. Reg. 38,906-38,907 (1994) (carbon monoxide NAAQS); 52 Fed. Reg. 24,634-24,635 (1987) (PM NAAQS); 50 Fed. Reg. 25,532 (1985) (nitrogen dioxide NAAQS).

mentation plan (SIP) that sets forth pollution control measures necessary to attain all NAAQS by the applicable attainment dates. See 42 U.S.C. 7410(a), 7502(c). See generally *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976); *Train*, *supra*. If a State fails to develop an adequate SIP, then EPA must promulgate measures to attain the NAAQS in the form of a federal implementation plan (FIP). 42 U.S.C. 7410(c).

Congress laid the foundation for the CAA's current regulatory scheme through the Clean Air Act Amendments of 1970 and the Clean Air Act Amendments of 1977. See note 2, *supra*.[5] Congress built further on that foundation through the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, which address, among other things, the continuing problem of NAAQS nonattainment. Congress retained with limited modifications the basic planning obligations in Section 110 for States to implement all NAAQS, including "any revision thereof," in all areas of the Nation, regardless of their designation status. 42 U.S.C. 7410(a)(1). Congress, however, adjusted the attainment obligations for the NAAQS then in existence and revised the attainment obligations that would result if EPA promulgated new or revised NAAQS. As a consequence, the 1990 Amendments contain a complicated set of new implementation obligations, set out in the CAA's Title I, Part D, for nonattainment areas. See 42 U.S.C. 7501-7515 (1994 & Supp. III 1997).

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[5] The Clean Air Amendments of 1970 introduced the NAAQS concept and required States to attain each NAAQS "as expeditiously as practicable but * * * in no case later than three years" after EPA approves a SIP. 42 U.S.C. 1857c-5(a)(2)(A)(i) (1970). The Clean Air Act Amendments of 1977 added a new outside attainment date (1982, or 1987 if extended, 42 U.S.C. 7502(a) and (c) (1982)), and introduced the concept of designating areas "nonattainment" for each NAAQS. 42 U.S.C. 7407(d) (1982). The 1977 Amendments also introduced a new "Part D," which contained additional attainment provisions for all NAAQS that apply to all nonattainment areas. See 42 U.S.C. 7501-7508 (1982) (Pt. D, Tit. I).

First, Congress modified the general nonattainment provisions that it had previously set out in Part D, see note 5, *supra*, and placed them in a new subpart, titled "Subpart 1 —Nonattainment Areas in General." 42 U.S.C. 7501-7509a (1994 & Supp. III 1997). Section 172(a) of that Subpart includes a new scheme for EPA to classify and establish attainment dates for nonattainment areas, based upon various factors, including the severity of the area's pollution problem. 42 U.S.C. 7502(a).[6] That scheme applies to all nonattainment areas "with respect to any [NAAQS] (or any revised standard, including a revision of any standard in effect on November 15, 1990)." 42 U.S.C. 7502(a)(1)(A).

Second, Congress created a series of new subparts in Part D, which address nonattainment of each of the then-existing NAAQS. See 42 U.S.C. 7511-7514a (1994 & Supp. III 1997) (Subpts. 2-5, Pt. D, Tit. I). Subpart 2 contains specific implementation provisions for the ozone NAAQS, which apply in addition to the general implementation provisions in Subpart 1. See 42 U.S.C. 7511-7511f (1994 & Supp. III 1997) ("Subpart 2—Additional Provisions for Ozone Nonattainment Areas").[7] Those provisions address the continued nonattainment, as of 1990, of the primary ozone NAAQS then in existence (*i.e.*, the "one-hour" ozone standard). Section 181(a)(1) of that Subpart sets out specific classifications and attainment dates that apply "by operation of law" for areas that, prior to the 1990 Amendments, were designated

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[6] The dates must be set so that attainment is achieved as "as expeditiously as practicable," with outside dates that may range up to 10 years from the date an area is designated nonattainment, with two one-year extensions possible. 42 U.S.C. 7502(a)(2)(A) and (C).

[7] Subparts 3-5 contain additional provisions that address the continued nonattainment of the other existing standards. 42 U.S.C. 7512-7512a (1994 & Supp. III 1997); 42 U.S.C. 7513-7513b, 7514-7514a.

nonattainment under the one-hour ozone standard. 42 U.S.C. 7511(a)(1).[8]

Third, Congress reconciled EPA's general authority under Section 172(a) of Subpart 1 to classify and establish attainment dates for nonattainment areas with the attainment schedule in Section 181(a)(1) of Subpart 2 (and in other Subparts of Part D). Congress provided that EPA's authority in Section 172(a) shall not apply to "nonattainment areas for which classifications [or "attainment dates"] are specifically provided under other provisions of [Part D]." 42 U.S.C. 7502(a)(1)(C) and (a)(2)(D). Thus, to the extent that Section 181(a)(1) specifically provides classifications and attainment dates for areas designated nonattainment for the one-hour ozone standard, EPA may not invoke Section 172(a) to establish classifications and attainment dates for *that* ozone NAAQS.

II. THE PARTICULATE MATTER AND OZONE RULEMAKING PROCEEDINGS

On July 18, 1997, EPA promulgated revised primary and secondary air quality standards for PM and ozone. In each rulemaking, the Criteria Documents and Staff Papers underwent several rounds of review by CASAC, public comment, and revision by EPA. Ultimately, CASAC notified EPA that the PM and ozone Criteria Documents provided an adequate scientific basis for regulatory decisions. PM App. 3151; 97-1441 C.A. App. (Ozone App.) 235. CASAC also notified EPA that the PM and ozone Staff Papers, which among other things identified ranges of

[8] Table 1 of Section 181(a)(1) establishes specific classifications for nonattainment areas under the one-hour ozone standard based upon the area's "design value," which refers to the measurement methodology then in use. See note 29, *infra*. Table 1 also sets a corresponding attainment date for each classification, expressed as either 3, 6, 9, 15, or 20 years "after November 15, 1990," when the 1990 Amendments were enacted. 42 U.S.C. 7511(a)(1).

potential standards for the Administrator's consideration, were likewise scientifically adequate. PM App. 3162; Ozone App. 236-238. As required by Section 109, EPA then set new PM and ozone standards based on the revised air quality criteria. EPA provided exhaustive explanations of the basis for the two decisions, which we briefly summarize below.

A. The Particulate Matter Rule

Particulate matter encompasses a broad class of chemically and physically diverse liquid and solid particles. 62 Fed. Reg. at 38,653. Scientists generally distinguish between two categories of PM—fine and coarse. Both were encompassed by the "PM_{10}" standards that EPA set in 1987.[9]

EPA revised the PM standards based on new scientific studies that had emerged since EPA's last PM review, including an extensive body of epidemiological studies on exposure to PM pollution.[10] More than 60 such studies showed statistically significant positive associations between exposure to PM air pollution and serious adverse health effects, including premature death and illness severe enough to require hospital admission. 61 Fed. Reg. at 65,641-65,643; PM App. 1375-1778, 1801-1845 (Criteria Document). The same evidence identified several large "sensitive" popula-

[9] Generally, fine particles are by-products of combustion or the reaction and transformation of gases. PM App. 519, 1786. Coarse particles generally are the result of abrasion of material into smaller pieces, which are then suspended in the air by wind or human activity. *Id.* at 519, 1787. PM_{10} denotes particulate matter up to about 10 micrometers (μm) in diameter, which is the fraction of PM that can be inhaled into the human lungs. 62 Fed. Reg. at 38,654 n.1, 38,666-38,667. $PM_{2.5}$ denotes particles up to about 2.5 μm in diameter. *Id.* at 38,654 n.5.

[10] Epidemiological studies examine patterns of disease in real-world human populations. Epidemiologists look for statistical associations that may reflect cause-and-effect relationships, using the concept of statistical significance to separate those associations from results that may be the product of chance. See *Modern Epidemiology* 184 (K.J. Rothman & S. Greenland eds., 2d ed. 1998).

tions that may experience health effects at lower PM concentrations, or more severely, than the general public. 61 Fed. Reg. at 65,644. Those populations included the elderly, children, and people with cardiovascular and respiratory disease, including asthma. *Ibid.*; PM App. 1991-1993.

The scientific studies indicated that those very serious health effects were "attributable to PM at levels below the current NAAQS." PM App. 1870. The Administrator concluded, based on the nature of the health effects and the huge size of the affected populations, 62 Fed. Reg. at 38,657, that the studies provided "strong evidence that the current PM_{10} standards do not adequately protect public health, and that revision of the standards is not only appropriate, but necessary," *id.* at 38,665.

The Administrator decided she could best protect against the health risk posed by PM by adopting two sets of standards: (1) $PM_{2.5}$ NAAQS to control fine particles, which were likely responsible for those health effects associated with PM concentrations at or below the 1987 NAAQS; and (2) PM_{10} NAAQS to provide continued control of inhalable coarse particles. 62 Fed. Reg. at 38,665-38,668. The Administrator selected the annual $PM_{2.5}$ NAAQS as the "generally controlling" standard to reduce both long-term and peak $PM_{2.5}$ concentrations and adopted the 24-hour $PM_{2.5}$ NAAQS only to address unusual circumstances. *Id.* at 38,669.

To select the levels requisite to protect public health, with an adequate margin of safety, the Administrator relied chiefly on epidemiological studies that employed direct measures of fine particles, such as $PM_{2.5}$. 62 Fed. Reg. at 38,675-38,676 & n.41. "[P]lacing greatest weight on those studies that were clearly statistically significant," the Administrator concluded that an annual $PM_{2.5}$ standard of 15 micrograms per cubic meter of air ($\mu g/m^3$) "will provide an adequate margin of safety against the effects observed in these epidemiological studies." *Id.* at 38,676. That level is just below the range of 15.7 to 21 $\mu g/m^3$ that encompasses the

annual mean $PM_{2.5}$ levels in locations where epidemiological studies had shown statistically significant positive associations between fine particles and adverse health effects. *Ibid.*; PM App. 3506-3521. The Administrator acknowledged that "the possibility of effects at lower annual concentrations cannot be excluded," but she noted that the evidence supporting that possibility—which did not rise to the level of statistical significance—is "highly uncertain," and therefore did not warrant establishment of a lower annual standard. 62 Fed. Reg. at 38,675-38,676; PM App. 3506-3521.[11]

B. The Ozone Rule

Ground-level ozone is a ubiquitous pollutant formed in the air from the interaction in sunlight of nitrogen oxides and volatile organic compounds emitted from many sources. It is the principal component of smog and a powerful lung irritant. See 62 Fed. Reg. at 38,858.[12]

EPA's review of the latest scientific knowledge on ozone disclosed a large body of new research demonstrating associations between adverse health effects and exposure to ozone over longer periods, at more moderate levels of exertion, and at lower concentrations than had been shown by the studies available in 1979, when EPA had promulgated an ozone standard of 0.12 parts per million (ppm) averaged over one hour (the one-hour standard). 62 Fed. Reg. at 38,859; 61 Fed. Reg. at 65,719-65,720. Some of those new studies showed health effects associated with prolonged (six to eight hours) exposure to ozone levels as low as 0.08 ppm. 62 Fed.

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[11] EPA adopted a 24-hour $PM_{2.5}$ NAAQS of 65 $\mu g/m^3$ to "supplement" the protection afforded by the annual $PM_{2.5}$ standard. 62 Fed. Reg. at 38,677. The Administrator also determined that secondary $PM_{2.5}$ standards identical to the primary $PM_{2.5}$ standards were appropriate to protect public welfare from, among other things, adverse effects on visibility. *Id.* at 38,683.

[12] The ozone NAAQS regulates harmful ground-level or "tropospheric" ozone, and not stratospheric ozone, which "provides a protective shield from excess ultraviolet radiation." 62 Fed. Reg. at 38,858.

Reg. at 38,859. The studies also showed that, in comparison to the general population, active children and workers who regularly engage in outdoor activities are at greater risk of experiencing adverse health effects from exposure to ozone. *Ibid.* In addition, people with pre-existing respiratory disease are more susceptible than others to the effects of ozone. *Ibid.* See generally Ozone App. 1460-1648, 1740-1780, 3770-3786, 3875-3881 (Criteria Document).

The scientific evidence convinced the Administrator that she should revise both the averaging time and the concentration level of the 1979 one-hour ozone standard. 62 Fed. Reg. at 38,863. She determined, and CASAC concurred, that an eight-hour standard was more consistent than a one-hour standard with the kind of prolonged exposures at which the scientific evidence showed children and others in at-risk populations were experiencing health effects of concern. *Id.* at 38,861. In addition, EPA's quantitative exposure and risk assessments showed that an eight-hour standard would provide significantly greater nationwide uniformity in health protection than a one-hour standard. *Id.* at 38,862.

To select a concentration level for the eight-hour averaging period, EPA employed a weight-of-evidence approach. Using, with CASAC's concurrence, guidelines of the American Thoracic Society, EPA considered the medical significance, or "adversity," of ozone-related health effects, which can vary widely. 62 Fed. Reg. at 38,860.[13] EPA also considered the public health implications of its conclusions regarding effects on individuals. For that purpose, EPA prepared quantitative exposure and risk assessments that used (among other information) data from human clinical

[13] For example, effects that may be mere nuisances to many healthy people may have serious consequences for asthmatics. EPA and CASAC also recognized that an effect that may be medically insignificant if experienced only once may, with repetition, become adverse by setting the stage for more serious illness. 61 Fed. Reg. at 65,723; Ozone App. 1881-1882.

studies to estimate, for various levels of ozone in the ambient air, the number of people within certain sensitive population groups likely to experience effects that would interfere with normal activity. *Id.* at 38,861-38,873.

EPA narrowed its consideration to the range of 0.07 ppm to 0.09 ppm for an eight-hour ozone standard. The upper bound for consideration could be no higher than 0.09 ppm because the exposure and risk assessments showed that the risks associated with an eight-hour standard of 0.09 ppm were "the same or only marginally smaller" than those associated with the 1979 one-hour standard, which EPA and CASAC agreed provided "little, if any, margin of safety." 62 Fed. Reg. at 38,863-38,864. The lower bound for consideration also emerged from the scientific evidence, including in particular: (1) the absence of any human clinical studies on exposures below 0.08 ppm, *id.* at 38,863; and (2) quantitative exposure assessments showing that a 0.07 ppm standard would, over the course of an ozone season, limit "exposures of concern" to "essentially zero," *ibid.*[14]

The Administrator explained why she found significant differences in the character of the available scientific evidence regarding ozone exposures within the range identified. She compared a 0.08 ppm standard to a 0.09 ppm standard on the basis of a number of factors, including estimates of the relative number of children that would experience adverse health effects, the relative frequency of such effects, and relative increases in hospital admissions. Those estimates and estimates of occurrences of "exposures of concern"

[14] With CASAC's concurrence, EPA deemed eight-hour exposures, during moderate exertion, to ozone concentrations of 0.08 ppm or above to be "exposures of concern" for purposes of the quantitative exposure and risk assessments. 62 Fed. Reg. at 38,865. In those analyses, EPA used data from human clinical studies, which necessarily related to only the mildest health effects. A single "exposure of concern" would not necessarily cause adverse effects, but is an indicator of the public health impacts of more serious effects.

under a standard of 0.09 ppm counseled against use of that concentration. 62 Fed. Reg. at 38,867-38,868; see note 14, *supra*. For example, EPA estimated that a 0.09 ppm standard would allow more than three times as many children to experience exposures of concern than would a standard of 0.08 ppm. 62 Fed. Reg. at 38,868.

The Administrator also explained why she concluded that a standard set below 0.08 ppm would be more stringent than requisite to protect against adverse effects of public health significance. See 62 Fed. Reg. at 38,863-38,868. With CASAC's concurrence, EPA had reasonably assumed, for purposes of the quantitative risk assessment, that there is no "effects threshold" for the categories of health effects measured in human clinical studies—lung function decreases and respiratory symptoms. EPA therefore assumed that those effects may occur at ozone levels below 0.08 ppm. See 61 Fed. Reg. at 65,725-65,726. As to those effects, the record showed that average responses caused by exposures even at 0.08 ppm were "typically small or mild in nature." 62 Fed. Reg. at 38,864. The Administrator recognized that repeated exposures at the 0.08 ppm level could potentially produce adverse effects for some unusually sensitive individuals, *ibid.*, but the record indicated that the "most certain" ozone-related effects at and below that level, even when adverse, are "transient and reversible," *id.* at 38,868. Moreover, the quantitative exposure and risk assessments showed that a standard set at 0.08 ppm would significantly reduce the number of such exposures. See *ibid.* As for more serious health effects, EPA lacked clinical data indicating the existence of an exposure-response relationship at ozone levels below 0.08 ppm. See *id.* at 38,863-38,864, 38,868; Ozone App. 1962. Furthermore, none of the CASAC advisors recommended setting the revised NAAQS at a level below 0.08 ppm. 62 Fed. Reg. at 38,864-38,865, 38,868. Accordingly, the Administrator reasonably concluded, based on the available evidence, that an eight-hour ozone standard

of 0.08 ppm would be sufficient to protect public health with an adequate margin of safety. *Id.* at 38,868-38,869.[15]

In addition to explaining the basis for its decisions, EPA responded, as required by the Act, 42 U.S.C. 7607(d)(6)(B), to all significant public comments. Various commenters had argued that, by enacting in 1990 specific provisions regarding implementation of the one-hour ozone standard then in effect, *e.g.*, 42 U.S.C. 7511(a)(1), Congress had effectively codified that standard and precluded EPA from revising it. In response, EPA explained that its authority to revise the one-hour ozone standard was clear on the face of the Act and then briefly and generally discussed how some of the Act's provisions would apply to implementation of a revised ozone standard. The sole purpose of that discussion was to respond fully to the comments arguing that the 1990 Amendments curtailed EPA's authority to revise the ozone standard. 62 Fed. Reg. at 38,884-38,885; see App., *infra*, 1a-6a (reproducing the preamble discussion).

III. THE PROCEEDINGS BELOW

Numerous industry groups, a public interest group, and several States and individuals challenged the revised PM and ozone NAAQS. The court of appeals rejected many of the challenges, but nevertheless remanded both final rules to EPA with instructions "to develop a construction of the act" that would satisfy this Court's "nondelegation doctrine." Pet. App. 4a, 5a. Relying on a theory that the parties had not extensively briefed, the court concluded that EPA's interpretation of Section 109 of the CAA "effects an unconstitutional delegation of legislative power." *Id.* at 4a. According to the majority, EPA's interpretation of the Act

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[15] EPA set a revised secondary ozone standard identical to the revised primary standard. 62 Fed. Reg. at 38,878. In addition, EPA issued a separate rule, 40 C.F.R. 50.9(b), respecting future enforcement of the one-hour ozone standard, which the revised eight-hour ozone standard would replace. See note 26, *infra*.

leaves it "free to pick any point between zero and a hair below * * * London's Killer Fog," a notorious 1952 incident in which air pollution may have caused approximately 4000 deaths over four days. *Id.* at 13a. Judge Tatel dissented from that portion of the opinion, emphasizing that the majority "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence" upholding numerous statutes containing fewer guiding principles than Section 109. *Id.* at 59a.

In the ozone case (No. 97-1441), the court of appeals rejected the industry petitioners' argument that the 1990 Amendments, which established mandatory classifications and attainment dates for the primary one-hour ozone standard then in effect, see CAA § 181, 42 U.S.C. 7511, precluded EPA from revising the ozone NAAQS. Pet. App. 34a-37a. That ruling resolved the issue before the court. The court of appeals nevertheless went on to direct what EPA may and may not do when it proceeds—in the future—to implement the ozone NAAQS. The court ruled that EPA cannot implement the revised ozone NAAQS through Section 172 (42 U.S.C. 7502), but must instead employ Section 181(a) (42 U.S.C. 7511(a)). Pet. App. 34a, 37a-44a. Because the requirements of Section 181(a) are tied to the one-hour standard, the court's ruling effectively meant, as the court itself recognized, that EPA could promulgate, but could not enforce, the revised ozone NAAQS. *Id.* at 57a.[16]

EPA and other parties filed petitions for rehearing and suggestions for rehearing en banc. The panel granted rehearing, in part, to modify its opinion regarding EPA's authority to implement the revised ozone standard. Pet. App. 71a-72a. The panel rejected EPA's argument that,

[16] The court of appeals resolved some, but not all, of the other challenges to the PM and ozone rules. See Pet. App. 4a-5a. The court concluded that some of the issues could not be resolved "until such time as EPA may develop a constitutional construction of the act." *Id.* at 5a.

because EPA had yet to take final action implementing the revised ozone NAAQS, the court lacked jurisdiction to consider which provisions of the Act would govern implementation, including the specification of classifications and attainment dates. *Id.* at 78a-80a. The court found that EPA's statements on that issue in the preamble accompanying the revised ozone standard, made in response to industry comments challenging EPA's authority to *promulgate* that standard, see 62 Fed. Reg. at 38,884-38,885, constituted final agency action on the question of implementation that was ripe for judicial review. Pet. App. 78a-80a.

On the merits, the panel modified its opinion to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. Judge Tatel wrote separately because he disagreed with the panel majority's reasoning. Pet. App. 83a-89a. He found the statute ambiguous and would have deferred to EPA's interpretation. *Id.* at 84a. Judge Tatel nevertheless concurred in the judgment because, in his view, the modified decision would allow EPA to implement the revised ozone standard under Subpart 1 once an area has attained the one-hour standard in accordance with Subpart 2. *Id.* at 89a. As to the nondelegation issue, the panel denied EPA's petition for rehearing. It expressly rejected EPA's view that the relevant provisions of the Act set out intelligible principles that limit the agency's discretion. *Id.* at 72a-76a. Judge Tatel again dissented. *Id.* at 89a, 97a-99a.

The court also denied EPA's suggestion for rehearing en banc, with five of the court's eleven active judges voting in favor of rehearing en banc, and four voting against it. Pet. App. 90a-92a. Judge Silberman and Judge Tatel each wrote statements dissenting from the denial of rehearing en banc on the nondelegation issue. *Id.* at 92a-96a, 97a-99a. Chief Judge Edwards and Judge Garland joined in Judge Tatel's statement. *Id.* at 97a.

SUMMARY OF ARGUMENT

1. The court of appeals incorrectly concluded that Section 109 of the CAA, as interpreted by EPA, violates the nondelegation doctrine. Section 109's requirement that NAAQS must be set at a level "requisite to protect" public health with "an adequate margin of safety" does not constitute an unconstitutional grant of legislative power. Furthermore, the nondelegation doctrine does not impose a constitutional obligation on EPA to go beyond what Congress has directed and announce a "determinate criterion for drawing lines." Pet. App. 5a-6a. The court's novel view that the Constitution demands such a precise criterion—and that the agency must supply it—is fundamentally unsound.

Congress has directed EPA to establish NAAQS by reference to the CAA's detailed requirements, which set out intelligible principles to guide EPA's actions. The CAA's directives, which are more specific than many statutory directives that this Court has upheld, amply ensure that Congress has not abdicated its power to make the laws. The CAA prescribes the legal standards governing EPA's decisions, factors that EPA must consider in making its decisions under Section 109, a body of experts that EPA must consult on those decisions, and a rigorous set of procedures that EPA must follow. In short, the Act establishes multiple specific restrictions that cabin EPA's discretion in setting NAAQS. The nondelegation doctrine does not require more.

The court of appeals' direction that EPA must narrow the scope of Congress's direction is not only unprecedented, it also is contrary to the purpose of the nondelegation doctrine. The Court has developed that doctrine to enforce the Constitution's requirement that Congress alone shall exercise legislative power. The court of appeals has improperly employed the doctrine to expand the scope of its judicial review authority beyond the limits that Congress has set through the CAA's statutory standards for review of agency

action. The court of appeals' conclusion that EPA must provide a "determinate, binding standard" for setting NAAQS is not only inconsistent with the CAA's recognition that NAAQS must be set in the face of scientific uncertainties, but it is also likely impracticable. An Executive Branch agency, acting pursuant to congressional direction, is entitled to assess the available evidence and make a reasoned judgment on the proper regulatory standard. Contrary to the court of appeals' characterization, EPA's interpretation of its authority did not leave it free to set a NAAQS at any point between zero and "a hair below" an air pollution level that killed 4000 people in four days. To the contrary, the rulemaking records reveal that EPA properly construed and applied limitations on its discretion. It provided reasoned explanations, supported by the record evidence, for why it chose the challenged PM and ozone standards in light of continuously evolving scientific knowledge.

2. The court of appeals also erred in prematurely deciding the scope of EPA's authority to implement and enforce the revised standard. The court did so by subjecting EPA's preamble statements on how it may implement the revised ozone standard to judicial review. Those preamble statements do not constitute judicially reviewable agency action. EPA made those statements to respond to comments that the implementation scheme in Section 181(a)(1) negates EPA's authority to promulgate a revised ozone standard. Once the court of appeals rejected that challenge to EPA's NAAQS revision authority, its task was done. It should not have treated EPA's preamble statements that explain the basis for EPA's ozone NAAQS as separate agency action that is independently subject to judicial review.

Even if EPA's preamble remarks about what future steps it intends to take to implement the ozone NAAQS constituted "agency action," they are certainly not "final" agency action. Those statements are not the consummation of the agency's decisionmaking process and they do not create any

rights or obligations. They simply express EPA's current views on some aspects of the complicated implementation process that EPA and the States will undertake through future rulemakings. The CAA sets out a detailed procedure for conducting those rulemakings. Under the statutory process, EPA will issue final rules on specific subjects in an orderly fashion, and each final rule will be subject to judicial review when the rule is ripe for the court's review.

Even if EPA's preamble statements constituted final agency action, they would not be ripe for review. The issue of how to reconcile the numerous provisions governing implementation is, at this stage, too abstract. The courts do not have the benefit of EPA's explanation of how and why it has implemented a NAAQS in a particular way, which would be available only after EPA has completed the relevant rulemakings, including any required public notice and response to comments, and taken final action that actually implements the standard. The courts should not review those complex implementation issues until EPA has had the opportunity to work through the various implementation provisions, reconcile any conflicts, make any policy judgments, and apply its expertise to resolve any ambiguities in the statute.

3. If the Court decides to reach the merits, it should rule that the court of appeals' modified decision is incorrect, even as interpreted by Judge Tatel in his partial concurrence. The CAA authorizes EPA to implement the revised *national* ozone standard contemporaneously throughout the country, regardless of whether an area is violating the one-hour ozone standard. The court of appeals' decision would inappropriately force EPA to delay protecting the public from the very health consequences that warrant a NAAQS revision in the first place, until the area attains an air quality standard that EPA has concluded is inadequate to protect public health. Congress could not have intended that implausible result.

The statutory provision on which the court of appeals primarily relied—Section 181(a) of Subpart 2—implements

only the one-hour ozone standard. It does not apply to the revised eight-hour ozone NAAQS or otherwise curtail EPA's authority to implement that standard under Section 172(a) and any other applicable provision of Subpart 1. Moreover, because the Act requires the attainment of all NAAQS "as expeditiously as practicable," 42 U.S.C. 7502(a)(1)(A), 7511(a)(1), the court of appeals erred in concluding that EPA must delay implementation of the eight-hour NAAQS in any area until it attains the one-hour ozone standard.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE NONDELEGATION DOCTRINE

The nondelegation doctrine is "rooted in the principle of separation of powers." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving* v. *United States*, 517 U.S. 748, 758 (1996). The nondelegation doctrine does not require, however, that Congress dictate every detail of a regulatory program. Congress may rely on the other branches to make rules that carry out its will. See *Loving*, 517 U.S. at 758; *Mistretta*, 488 U.S. at 372.

This Court's application of the nondelegation doctrine has been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. The Court has accordingly recognized that Congress does not violate the Constitution "merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991); see *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (Congress

may "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed framework").

The Court has specifically emphasized that Congress does not violate the nondelegation doctrine if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)); *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218-219 (1989). "Only if we could say that there is an *absence of standards* for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose." *Mistretta*, 488 U.S. at 379 (emphasis added) (quoting *Yakus*, 321 U.S. at 425-426).

A. Section 109 Of The Clean Air Act Does Not Constitute An Unconstitutional Grant Of Legislative Power

Contrary to the court of appeals' conclusion, Section 109 easily satisfies this Court's "intelligible principle" standard. This Court's decisions leave no doubt that Section 109 does not amount to an invalid delegation of legislative power and that EPA can properly fulfill the responsibilities that Section 109 assigns. Section 109's directives "are far more specific than the sweeping statutory delegations consistently upheld by [this] Court for more than sixty years." Pet. App. 97a (Tatel, J., dissenting from denial of rehearing en banc); see also *id.* at 93a (Silberman, J., dissenting from denial of rehearing en banc); *id.* at 59a-60a (Tatel, J., dissenting) (collecting cases).

The starting point for nondelegation analysis is the CAA's language, which must be read in context with due regard to the Act's purpose and history. See *American Power & Light*, 329 U.S. at 104. A perusal of this comprehensive

legislation, which Congress has repeatedly amended in light of new knowledge and developments (see note 2, *supra*), reveals that Congress has exercised its lawmaking function with exacting care. The Act, which now occupies more than 280 pages in the United States Code, is extraordinarily detailed and prescriptive. As the Act has evolved, Congress has consistently recognized the need to rely on an Executive Branch agency's scientific resources and expertise in executing the legislative purposes. At the same time, Congress has carefully channeled EPA's discretion through increasingly detailed substantive and procedural requirements.

Section 109(b)(1) of the Act requires that primary NAAQS be set at levels "requisite to protect the public health" with an "adequate margin of safety" and that secondary standards be set at levels "requisite to protect the public welfare." 42 U.S.C. 7409(b)(1). To warrant the setting of a NAAQS, a pollutant must "reasonably be anticipated to endanger public health or welfare" and be emitted from "numerous or diverse * * * sources." 42 U.S.C. 7408(a)(1)(A)-(B). Each standard must be based on "air quality criteria" that reflect "the latest scientific knowledge," 42 U.S.C. 7408(a)(2), including information on "variable factors" that "may alter the effects on public health," as well as interactions with other pollutants "to produce an adverse effect on public health or welfare." 42 U.S.C. 7408(a)(2)(A)-(B). Further, the Act establishes and prescribes the composition of CASAC (see p. 4, *supra*) and requires EPA to consider, and explain any significant departure from, CASAC's advice on revision of the air quality criteria and standards. 42 U.S.C. 7409(d)(2), 7607(d)(9).[17]

Section 307(d) of the Act, 42 U.S.C. 7607(d), which sets out the procedures for rulemaking and judicial review, further

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[17] See *Mistretta*, 488 U.S. at 376 n.10 ("Congress' explicit requirement that the Commission consult with authorities in the field," among other things, gives content to the statutory mandate.).

ensures that EPA adheres to a "disciplined decisionmaking process" in setting NAAQS. See Pet. App. 63a (Tatel, J., dissenting). Congress has prescribed a rulemaking process that ensures extensive public participation. EPA must discuss the data, methodology, and major legal and policy interpretations underlying proposed NAAQS, 42 U.S.C. 7607(d)(3); provide a reasoned explanation for its decision, 42 U.S.C. 7607(d)(6)(A); and respond to significant comments, 42 U.S.C. 7607(d)(6)(B). EPA's rule is then subject to judicial review. 42 U.S.C. 7607(b)(1) and (d)(9).[18]

The Act's legislative history "provides additional guidance for [EPA's] consideration of the statutory factors" that is relevant for assessing the constitutionality of Section 109. *Mistretta*, 488 U.S. at 376 n.10. That legislative history, which the court below failed to consider, indicates that the health effects justifying a NAAQS must be "adverse," *Lead Indus.*, 647 F.2d at 1152 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) (S. Rep. 1196)), in the sense that they are medically significant and not merely detectable, *id.* at 1155 n.51. To provide an "adequate margin of safety," standards must be "preventative or precautionary," reflecting an emphasis on the "predominant value of protection of public health." *Ibid.* (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 49 (1977) (H.R. Rep. 294)); *id.* at 1155 (EPA must "err on the side of caution"). Furthermore, public health is distinct from individual health; the standards must protect sensitive populations, such as asthmatics, *id.* at 1152, but not the most sensitive individuals within those populations. See S. Rep. 1196, at 10 (EPA must consider effects on "a representative sample of persons comprising the sensitive group rather than to a single person in such a group."), in 1 Staff of

[18] The availability of such review weighs strongly in favor of the constitutionality of Section 109's grant of agency authority. See *American Power & Light*, 329 U.S. at 105 ("[p]rivate rights are protected by access to the courts to test the application of the policy in the light of the[] legislative declarations"); *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 410 (Comm. Print 1974).

In short, Congress has placed "multiple specific restrictions" on EPA's discretion in setting and revising NAAQS that satisfy the constitutional requirements of the nondelegation doctrine. *Touby*, 500 U.S. at 167. Those restrictions are at least as rigorous as those in *Touby* and other nondelegation cases, many of which in fact involved far less prescriptive legislation. See *id.* at 165.[19] The Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow in making its highly technical scientific judgments about the health and welfare effects of particular pollutants. As in *American Power & Light Co.*, the Act provides "a veritable code of rules" for EPA to fol-

[19] For example, in *Touby*, the Court held that the challenged statute, which authorizes the Attorney General to regulate new "designer" drugs, "meaningfully constrains" the Attorney General's discretion by requiring her to find that action is "necessary to avoid an imminent hazard to the public safety"; to "consider" three factors and statutorily prescribed criteria; to publish notice in the *Federal Register*; and to consider comments from an agency head. 500 U.S. at 166. In *Mistretta*, the Court held that the statutory authorization for sentencing guidelines is "sufficiently specific and detailed to meet constitutional requirements," noting that Congress specified three "goals" and four "purposes"; "prescribed the specific tool" for regulating sentencing; directed the Commission to consider seven "factors," and prohibited it from considering other factors; and explicitly required the Commission to consult authorities in the field of criminal sentencing. 488 U.S. at 374-375 & 376 n.10. In *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), the Court held the challenged statute constitutional because it established preconditions to presidential action; allowed the President to act only to the extent "necessary" to achieve the statutory objective; and articulated a series of specific factors that he was to consider in exercising his authority. *Id.* at 559.

low in fulfilling Congress's will. 329 U.S. at 105; see *Yakus*, 321 U.S. at 426.[20]

B. The Court Of Appeals Improperly Employed The Nondelegation Doctrine To Expand The Scope Of Its Review

This Court's nondelegation doctrine preserves the Constitution's separation of powers by ensuring that Congress does not abdicate its power to make laws. The court of appeals transformed that doctrine, however, into a judicial check on executive power. The court of appeals employed the nondelegation doctrine as an additional means, beyond the explicit judicial review provisions of the CAA, to supervise the exercise of administrative discretion. See Pet. App. 14a. The court directed EPA to "develop[] determinate, binding standards for itself" to reduce the likelihood that EPA would "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *Ibid.* That novel use of the nondelegation doctrine departs from the doctrine's purpose, it has no basis in this Court's precedents, and it trenches on Congress's power to specify appropriate standards for judicial review of executive action. See *id.* at 93a (Silberman, J., dissenting from the denial of rehearing en banc).

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[20] Because Section 109 so plainly satisfies the nondelegation doctrine, there is no need to consider, as some of the industry respondents have urged, whether EPA should have read Section 109 more narrowly to avoid a constitutional issue. This Court rejected a similar argument in *Algonquin SNG, Inc.*, 426 U.S. at 558-559. In that case, the Court held that because the standards provided by the challenged statute were "clearly sufficient to meet any delegation doctrine attack," there was no need to give the statute a narrow construction to avoid an alleged "serious question of unconstitutional delegation of legislative power." *Id.* at 559. So too, in this case, "the terminology" of the Act "does not come so close to" the "boundaries limiting the scope of congressional delegation to the executive branch" as "to raise a serious constitutional problem." Pet. App. 93a (Silberman, J., dissenting from denial of rehearing en banc).

The court of appeals viewed the nondelegation doctrine as requiring Congress, or agencies interpreting the intent of Congress, to delineate a "determinate criterion for drawing lines." Pet. App. 6a. In the court's view, the Constitution requires that EPA supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the "right" level. See *id.* at 10a-11a, 73a. That approach, however, is inconsistent with the court's limited role in reviewing NAAQS. The CAA makes clear that EPA's actions in setting NAAQS are subject to review under the arbitrary or capricious standard of judicial review. See 42 U.S.C. 7607(d)(9). Under that standard, the court is limited to examining whether EPA's action "was based on consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (*Overton*). "The court is not empowered to substitute its judgment for that of the agency." *Ibid.* As Judge Silberman recognized, the court of appeals' approach would "implicitly assert[] a greater role for a reviewing court than is justified." Pet. App. 96a. See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").[21]

Moreover, the court of appeals' demand for a determinate criterion to govern EPA's NAAQS decisions is difficult to

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[21] The court's direction to EPA to develop "determinate, binding standards" to govern the agency's NAAQS decisions (Pet. App. 14a, 73a) is also inconsistent with this Court's decision in *American Power & Light Co.*, which rejected the notion that there is "any constitutional requirement" obligating an agency to translate legislative standards into "formal and detailed rules of thumb" before applying them. 329 U.S. at 106. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978) (courts may not impose on agencies procedures that are not imposed by statute).

reconcile in practice with the Act's command that EPA set NAAQS—and revise them, as appropriate, every five years—based on the "latest scientific knowledge." 42 U.S.C. 7408(b). As the D.C. Circuit has recognized in the past, Congress has directed EPA to make "predictions * * * at the frontiers of science." *NRDC*, 902 F.2d at 968 (quoting *New York* v. *EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988), cert. denied, 489 U.S. 1065 (1989)); accord *Lead Indus.*, 647 F.2d at 1147. Because "the statute is '*precautionary*' in nature, the evidence 'uncertain or conflicting' and the 'regulations designed to protect the public health,'" the court of appeals has recognized that Congress did "not demand rigorous step-by-step proof of cause and effect." *NRDC*, 902 F.2d at 968 (citations omitted).

The purpose of Section 109's requirement that NAAQS provide an "adequate margin of safety" is to ensure "a reasonable degree of protection * * * against hazards which research has not yet identified." *Lead Indus.*, 647 F.2d at 1150 (quoting S. Rep. 1196, at 10). EPA must therefore be able to draw conclusions from "suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *NRDC*, 902 F.2d at 968 (quoting *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 28 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976)); H.R. Rep. 294, at 43-51, 110-112. To hold EPA to the court's novel demand for precision would restrict the agency's ability to act on a precautionary basis in the face of scientific uncertainties, thereby potentially eroding the public health protection Congress intended NAAQS to afford.

The court of appeals' requirement that EPA develop a "determinate criterion for drawing lines" (Pet. App. 6a), which EPA would presumably be required to apply in every NAAQS proceeding (see *id.* at 73a), is also inconsistent with EPA's own expert assessment of the flexibility necessary to

apply Section 109's mandate to all the pollutants for which EPA must develop standards. In the PM and ozone rulemaking proceedings, EPA received comments arguing that the Act required the agency to adopt various specific approaches to decisions under Section 109, such as, for example, first determining a "safe level" and then applying a margin of safety. 62 Fed. Reg. at 38,688, 38,883. In its response to those comments, EPA noted that the D.C. Circuit had specifically rejected claims that any of the approaches suggested by the commenters were required by the Act and instead had ruled that "[t]his court must allow [the Administrator] the discretion to determine which approach will best fulfill the goals of the Act." *Ibid.* (quoting *Lead Indus.*, 647 F.2d at 1161-1162).

The criteria pollutants that are subject to the NAAQS process vary widely in relation to key factors, including their health effects, the types of available scientific evidence, the kind and degree of scientific uncertainties, and the size of sensitive populations. Because of that wide variation:

> [T]he most appropriate approach to establishing a NAAQS with an adequate margin of safety may be different for each standard under review. Thus, no generalized paradigm * * * can substitute for the Administrator's careful and reasoned assessment of all relevant health factors in reaching such a judgment.

62 Fed. Reg. at 38,688; see *id.* at 38,883.[22]

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[22] The two pollutants at issue here illustrate this fact. In assessing the health effects of PM and ozone, EPA determined that the most useful scientific information currently consists primarily of epidemiological studies in the case of PM, but currently consists primarily of human clinical studies in the case of ozone. The PM epidemiological studies provide evidence of very serious health effects associated with ambient pollution concentrations, but that evidence must be evaluated in light of potentially confounding variables that cannot be directly controlled when studying "real world" populations. The human clinical studies on ozone provide strong evidence of specific effects triggered by controlled

At bottom, the court's rationale for its approach—to prevent arbitrary agency action and to enhance judicial review (Pet. App. 14a)—overlooks that Congress is entitled to set the parameters for judicial oversight of EPA's scientific judgments. Congress has concluded that EPA's actions in setting NAAQS are subject to the arbitrary or capricious test. See 42 U.S.C. 7607(d)(9). EPA must consider the factors that the Act prescribes and provide a reasoned explanation, based on scientific evidence, for its decision. When reviewing that decision, a court is not entitled to demand that EPA demonstrate that the numerical standard the agency selected was the sole possible choice. To the contrary, as this Court explained in reviewing rates set by the Federal Power Commission under a statute requiring rates to be "just and reasonable":

> [T]here is no single cost-recovering rate, but a zone of reasonableness: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high."

FPC v. *Conway Corp.*, 426 U.S. 271, 278 (1976) (quoting *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

This Court's decisions in *Conway* and similar cases do not announce novel concepts. The D.C. Circuit has itself acknowledged, when it reviewed the 1987 PM standard, that a reviewing court should not ask if EPA has identified "the clear and sole appropriate standard," but rather whether EPA has selected a standard that is reasonable in light of the record evidence. *NRDC*, 902 F.2d at 972. The court of appeals here relied on the nondelegation doctrine as its sole

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pollutant concentrations, but—for ethical and other reasons—cannot be used to measure directly very serious health effects or effects in highly susceptible individuals.

justification for departing from that established standard of review. Pet. App. 12a-13a. Under this Court's precedents, Section 109 does not violate the nondelegation doctrine. The court of appeals improperly relied on that doctrine to depart from traditional principles governing the scope of judicial review of agency action.

C. EPA Has Recognized Limitations On Its Discretion To Revise The Particulate Matter And Ozone Standards

The court of appeals' nondelegation holding rests on the erroneous conception that EPA interprets Section 109 to set no limits on its discretion. The court characterized EPA as claiming discretion so broad as to leave it free to "pick any point between zero and a hair below * * * London's Killer Fog." Pet. App. 13a. To the contrary, EPA has recognized and applied principles that channel its discretion far more narrowly than the court acknowledged.

The CAA's directive that EPA must base the revised NAAQS on "air quality criteria" reflecting the "latest scientific knowledge" limits, at the outset, the alternatives that EPA can consider. EPA found that a wide range of adverse health effects were occurring at concentrations below the pre-existing PM and ozone NAAQS, which effectively dictated an *upper* bound for any revised NAAQS. The revised PM and ozone NAAQS had to be at least as protective as those pre-existing standards. See, *e.g.*, 62 Fed. Reg. at 38,656-38,657, 38,665; *id.* at 38,859; 61 Fed. Reg. at 65,719-65,721; pp. 10-13, *supra*. In each case, EPA also identified a *lower* bound for consideration at the most protective levels the scientific evidence reasonably supported. For PM, the lower bound was the lowest level at which long-term epidemiological data indicated there might be an "effects threshold" below which there is no risk of health effects. See PM App. 2145, 2147. For ozone, which appears to have no effects threshold (see note 23, *infra*), the lower bound—0.07 ppm—was the level at which EPA's exposure

assessment showed that exposures of public health concern were "essentially zero." 61 Fed. Reg. at 65,728, 65,730.

EPA's review of the latest scientific knowledge on the health effects of PM confined the agency to considering a quite limited range of 12.5 to 20 $\mu g/m^3$ for the annual $PM_{2.5}$ standard (and 20 to 65 $\mu g/m^3$ for the daily $PM_{2.5}$ standard). See 62 Fed. Reg. at 38,675-38,677; PM App. 2158 (Staff Paper). That range is obviously far more narrow than a range from zero to a "hair below" 2,500 $\mu g/m^3$ (the level the court of appeals assumed for the "Killer Fog"). Similarly, EPA's review of the latest scientific knowledge on the health effects of ozone confined the agency to considering an eight-hour ozone standard between 0.07 ppm and 0.09 ppm. See p. 13, *supra*. EPA had identified those ranges in its Staff Papers, and CASAC had agreed that EPA's identification of those ranges had sound scientific support. See PM App. 3162; Ozone App. 238; pp. 8-9, *supra*.

Furthermore, although EPA may exercise discretion in selecting a standard, EPA is constrained in doing so by the CAA's explicit requirement that the agency consider relevant factors, apply them to relevant facts, respond to criticisms, and adequately explain its rationale. 42 U.S.C. 7607(d)(2)-(6). In fulfilling those obligations, EPA employed the decisional criteria that the agency has long used to ensure consistency in its NAAQS decisions. See p. 5, *supra*.

For example, in setting the annual $PM_{2.5}$ standards, EPA took account of the "types of health evidence" and the "kind and degree of uncertainties." EPA identified a scientific criterion applicable to epidemiological studies—statistical significance to the 95% confidence level—to determine "how much uncertainty [was] too much" within the narrow range under consideration. See Pet. App. 10a; 62 Fed. Reg. at 38,675-38,676; 61 Fed. Reg. at 65,642 n.8; see note 10, *supra*. The scientific evidence showed statistically significant positive associations between $PM_{2.5}$ and adverse health effects in locations where $PM_{2.5}$ ranged from 15.7 to 21 $\mu g/m^3$.

See pp. 10-11, *supra*. But no study showed a statistically significant association between adverse health effects and $PM_{2.5}$ in any area with an annual $PM_{2.5}$ level *below* 15.7 $\mu g/m^3$. See 62 Fed. Reg. at 38,676; PM App. 3506-3521. EPA therefore set the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$, which EPA determined would be requisite to protect public health with an adequate margin of safety.

In the ozone rule, EPA selected the standard based primarily on consideration of "the nature and severity of the health effects," "the size of the sensitive population at risk," and, again, the "types of health evidence." EPA recognized that a standard of 0.09 ppm would not protect public health with an adequate margin of safety. See pp. 13-14, *supra*. EPA also recognized that its mandate is not to set standards more stringent than requisite to protect against health effects of public health significance. EPA identified important and meaningful differences in the character of the scientific evidence regarding risks—including the estimated frequency and duration of adverse health effects—associated with levels above and below 0.08 ppm. Those differences amply justified the Administrator's selection of the 0.08 ppm level as requisite to protect public health with an adequate margin of safety. *E.g.*, 62 Fed. Reg. at 38,864-38,868; 61 Fed. Reg. at 65,727, 65,730; see also pp. 13-15, *supra*.[23]

The record accordingly demonstrates that EPA did not exercise unfettered discretion in promulgating the revised PM and ozone standards. To the contrary, EPA explained in detail, with reference to the scientific evidence in the record, why it selected the challenged PM and ozone standards. The court of appeals thus failed to appreciate the record before it

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[23] EPA and CASAC recognized that ozone has no apparent effects threshold. See, *e.g.*, 62 Fed. Reg. at 38,863. CASAC acknowledged that fact when it commented that no "bright line" differentiated ozone levels within the range of 0.07 ppm to 0.09 ppm. Ozone App. 238. CASAC's comment did not mean, however, that the public health effects were the same at any level within the range. See 62 Fed. Reg. at 38,865.

in erroneously concluding that EPA claimed such wide discretion that it could have set the new standards at virtually any level. Cf. *Overton*, 401 U.S. at 416.

II. THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW EPA'S PREAMBLE STATEMENTS ON THE SCOPE OF ITS AUTHORITY TO IMPLEMENT A REVISED OZONE STANDARD

Section 307(b)(1) of the CAA authorizes the D.C. Circuit to review "action of the Administrator in promulgating any [NAAQS]" and other "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. 7607(b)(1). In this case, the court of appeals plainly had jurisdiction to review EPA's promulgation of the ozone NAAQS. The NAAQS, which consists of a specific, two-paragraph rule, Pet. App. 104a, is final agency action. The court of appeals erred, however, in concluding that it also had authority to critique portions of EPA's explanatory preamble and thereby dictate the course of the agency's future implementation actions. The court of appeals' broad pronouncement that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," Pet. App. 81a, results from that court's premature and unfocused exploration of issues that were not properly before that court.

EPA's rulemaking addressed promulgation of a revised ozone NAAQS. The issue of implementation arose in the ozone case because participants in the rulemaking proceeding argued that, when Congress enacted the 1990 Amendments and included—in Section 181(a)(1) of Subpart 2—a scheme for implementing the then-current one-hour ozone standard, Congress thereby implicitly prohibited EPA from ever promulgating a revised ozone standard. See p. 15, *supra*. Section 307(d)(6) of the CAA requires EPA to respond to "significant comments." 42 U.S.C. 7607(d)(6). EPA accordingly addressed those arguments in the rule-

making preamble and, later, in its brief in the court of appeals. EPA explained generally, as part of its demonstration why the Section 181(a) scheme does not prevent EPA from promulgating a revised NAAQS, that the revised standard could be implemented through Subpart 1. See App., *infra*, 1a-6a; 62 Fed. Reg. at 38,884-38,885.[24]

The court of appeals was obligated to address the specific arguments that the rulemaking participants had raised in their judicial challenge to EPA's promulgation of a revised ozone NAAQS. See 42 U.S.C. 7607(d)(7)(B). The only issue involving "implementation" before the court of appeals, however, was whether the participants were correct that the Section 181(a) scheme precluded EPA from promulgating the revised standard. Once the court answered that question in the negative, Pet. App. 34a-37a, its task was done. It should not have gone on to consider prematurely whether and how EPA could implement the revised NAAQS.

The government objected, through petitions for rehearing and rehearing en banc, to the court of appeals' decision to address an issue that was not properly before it. The court responded by asserting that it had jurisdiction to address the views that EPA expressed in the preamble because those explanatory statements about the agency's future intentions independently satisfied the final agency action requirement of Section 307(b) of the CAA. Pet. App. 77a-78a. That conclusion is wrong.

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[24] Consistent with its position here, EPA explained in the rulemaking that "[a] number of commentors submitted comments * * * regarding implementation issues that are not relevant to the Ozone NAAQS review. Therefore, they are not being responded to in this document." Ozone App. 223. EPA clearly recognized that such comments were premature and would be addressed, if necessary, in later rulemakings.

A. EPA's Preamble Statements Regarding Implementation Authority Are Not "Agency Action" Within The Meaning Of Section 307(b)(1) Of The Act

The court of appeals has undertaken to address prospectively how to reconcile two complex portions of the CAA—Subparts 1 and 2 of Part D—even though EPA has not yet undertaken that task through rulemaking. The court justified its review on the basis that EPA stated, in an explanatory preamble, how it intends to reconcile those provisions. See 62 Fed. Reg. at 38,884-38,885 (App., *infra*, 1a-6a). Section 307(b)(1), however, limits the court of appeals to review of particular agency actions, such as "promulgating any * * * [NAAQS]" and other "final action * * * taken[] by the Administrator." 42 U.S.C. 7607(b)(1).

The CAA does not define the phrase "action * * * taken[] by the Administrator," but its meaning can be discerned from conventional principles of administrative law. Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980). The Administrative Procedure Act (APA) defines the term "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13); see 5 U.S.C. 701(b)(2). As this Court has indicated, the phrase "agency action" is limited to discrete acts that affect legal rights. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 247 (1980) ("In general, the term encompasses formal orders, rules, and interpretive decisions that crystallize or modify private rights.") (Stevens, J., concurring).

The CAA also draws a clear distinction between agency action and the agency's *explanation* of its action. For example, a promulgated rule—a familiar form of agency action—must be "accompanied" by "a statement of basis and

purpose" and "a response to each of the significant [public] comments [on the proposed rule]." 42 U.S.C. 7607(d)(6). That requirement facilitates judicial review of whether the agency's rule is "arbitrary, capricious, or an abuse of discretion," 42 U.S.C. 7607(d)(9). A court is entitled to set aside the rule if it concludes that the agency's rationale for the rule is inadequate. But in that situation, the court invalidates the rule itself —*viz.*, the agency's action—and not the agency's explanation for its action. See *ibid.*; see also 5 U.S.C. 706(2). The agency's explanation is not itself "agency action" that is independently subject to review. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black* v. *Cutter Labs.*, 351 U.S 292, 297 (1956)); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

In this case, EPA's "action" is promulgation of the revised ozone NAAQS, which consists of a discrete rule. See Pet. App. 104a. The rule itself makes clear that the preamble sets out the "reasons" for the rule. *Ibid.* The related preamble statements at issue here (see App., *infra*, 1a-6a) could properly be considered by the court of appeals only as they relate to the agency action in question—promulgation of the revised ozone NAAQS. Those statements do not themselves constitute "agency action." If they did, then virtually any regulatory preamble that endeavors to explain the basis for an agency's action would arguably spawn additional agency actions that are each potentially subject to judicial review and revision. Congress surely did not authorize courts to engage in that sort of broad and limitless anticipatory oversight of CAA programs. See *Standard Oil*, 449 U.S. at 247-249 (Stevens, J., concurring).

B. EPA's Preamble Statements Do Not Constitute "Final" Agency Action

Even if EPA's preamble statements constituted "agency action," they do not constitute "final" agency action. In *Bennett* v. *Spear*, 520 U.S. 154 (1997), this Court identified two conditions that must be satisfied for agency action to be "final": (1) it "must mark the 'consummation' of the agency's decisionmaking process"; and (2) it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-178. EPA's discussion of the Act's implementation provisions in the preamble does not satisfy either of those requirements.

The court of appeals improperly reconfigured the "consummation" prong by focusing solely on whether the plans that EPA described in the preamble appeared tentative or likely to change. See Pet. App. 77a-78a. Under *Bennett*, however, the proper inquiry is not merely whether the agency has any present intention to alter its position. Rather, the question is whether the agency has consummated its decisionmaking process. The answer necessarily depends upon what steps the governing statute requires.[25]

When EPA's preamble statements are considered in light of the CAA's implementation program, it is clear that they do not constitute final agency action. EPA completed the

[25] For example, the Court concluded in *Standard Oil Co.*, *supra*, that the action at issue—filing an administrative complaint—was not final agency action under the relevant statutory process. The Court explained that the action "is a prerequisite to a definitive agency position on the question whether Socal violated the Act, but itself is a determination only that adjudicatory proceedings will commence." 449 U.S. at 241-242. Likewise, in cases involving rulemakings, the Court has concluded that agency regulations are final if the agency has completed the applicable rulemaking procedures and promulgated a legally binding rule that completed action within the context of the substantive regulatory program. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149-152 (1967) (discussing cases). Thus, the certitude of an agency's statements, standing alone, does not satisfy the consummation prong.

statutory process for reviewing the existing ozone standard, 42 U.S.C. 7408(a), 7409(d), and reached a final decision promulgating the eight-hour ozone standard. EPA thus consummated its decisionmaking process and took final agency action in *promulgating the NAAQS*. 42 U.S.C. 7607(b)(1). EPA, however, has hardly begun and has not yet completed any step in the CAA's distinct process for implementing the revised ozone NAAQS, which requires additional rulemaking procedures.[26]

The CAA provides EPA up to three years after promulgating a revised NAAQS to designate all areas within the Nation as attainment, nonattainment, or unclassifiable for

[26] As part of the ozone NAAQS rulemaking, EPA issued a separate rule, 40 C.F.R. 50.9(b), respecting future enforcement of the *one-hour ozone standard*, which the eight-hour ozone NAAQS will replace. That rule states that

> The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

Ibid. EPA issued that rule as a transition measure to relieve areas that are in compliance with the one-hour ozone standard from the obligation to comply with both the old one-hour standard and the new eight-hour standard. See 62 Fed. Reg. at 38,873. In the course of explaining that rule, EPA stated in the preamble that Subpart 1 would apply to implementation of the new eight-hour ozone standard. *Ibid.* See App., *infra*, 6a-8a.

Neither 40 C.F.R. 50.9(b) nor EPA's related preamble statement provides a jurisdictional basis for the court of appeals' decision limiting EPA's authority to implement the eight-hour standard under Subpart 1. As an initial matter, no party in this case challenged 40 C.F.R. 50.9(b), the court of appeals accordingly did not review it, and thus it clearly was not the predicate for the court of appeals' ruling. In any event, 40 C.F.R. 50.9(b) merely addresses interim enforcement of the pre-existing one hour standard. Neither 40 C.F.R. 50.9(b) nor EPA's preamble statements describing it resolve whether or how Subparts 1 and 2, and other provisions of the Act, may interact to limit EPA's authority to implement the eight-hour standard.

that standard. 42 U.S.C. 7407(d)(1).[27] At the same time, for nonattainment areas, EPA must establish schedules for States to submit state implementation plans. 42 U.S.C. 7502(b). EPA may establish classifications for nonattainment areas and must establish their attainment dates. 42 U.S.C. 7502(a); see also 42 U.S.C. 7511(a)(1). States develop, for EPA approval or disapproval, their SIPs to implement the NAAQS by the applicable attainment dates. See 42 U.S.C. 7410(a) and (k), 7502(c). Under that statutory structure, NAAQS implementation proceeds through a careful decisionmaking process that includes designation, setting dates for SIP submissions, classifying nonattainment areas, developing SIPs, setting attainment dates, and obtaining EPA's approval of the SIPs. EPA's expression of its views, in a regulatory preamble, on some aspects of that future process cannot reasonably be viewed as completing any of the discrete steps that make up that process.

EPA did not take action in the rule under review to designate, classify, or set attainment dates for any areas, to set schedules for SIP submissions, or to approve or disapprove any SIP. Thus, EPA's preamble statements do not mark the consummation of any part of the agency's implementation process. They do not conclude the agency's thinking on how it may implement the revised ozone standard, or precisely whether or how implementation of the revised eight-hour standard may be affected by any Subpart 2 provisions. EPA's deliberations on those matters are ongoing and have not yet resulted in final agency action that is ripe for judicial review.

The preamble statements also do not satisfy the second *Bennett* requirement that "the action must be one by which 'rights or obligations have been determined,' or from which

[27] Congress slightly modified this schedule in 1998 with respect to the revised standards at issue here. Pub. L. No. 105-178, §§ 6101(b), 6102(c), 6103(a)-(b), 112 Stat. 463-465.

'legal consequences will flow.'" 520 U.S. at 178. The court of appeals concluded that EPA's preamble statements respecting future implementation were final action because by "promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states * * * [and] those areas that do not comply will ultimately be required to do so." Pet. App. 78a. Any obligations triggered by promulgation of the NAAQS arise, however, regardless of what EPA said, or did not say, in the preamble about implementation. No legal consequences flow from the preamble statements themselves. EPA's views on implementation will produce tangible legal consequences only when EPA takes actual steps to implement the NAAQS through the prescribed rulemaking processes. Affected parties will be able to obtain judicial review of EPA's judgments on implementation once EPA takes final action that actually creates new legal obligations.

C. EPA's Preamble Statements Regarding Implementation Of The Eight-Hour Ozone Standard Are Not Ripe For Review

Even if EPA's preamble statements were final agency action, that purported agency action would not be ripe for judicial review. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has oeen formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-733 (1998) (quoting *Abbott Labs.*, 387 U.S. at 148-149).

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc.*

Servs., Inc., 509 U.S. 43, 57 n.18 (1993). To determine whether a controversy is ripe a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas* v. *United States*, 523 U.S. 296, 301 (1998). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 300.

The court of appeals' concerns regarding how to reconcile Subparts 1 and 2 are not yet fit for review because, at this stage, the matter is too abstract, as demonstrated by the breadth and generality of the court's conclusion. EPA has neither fully developed its interpretation nor attempted to exercise its authority to implement the eight-hour ozone standard. See, *e.g.*, *Ohio Forestry*, 523 U.S. at 732-738; *Abbott Labs.*, 387 U.S. at 148-149.

The interplay among Sections 107(d), 172, and 181, and other relevant provisions of the Act, is complex. As we have explained, EPA expressed views on selected implementation provisions of the Act to respond to comments in the ozone rulemaking that those provisions negate EPA's NAAQS revision authority. A court's consideration of whether and how Section 181(a) and other sections of Subpart 2 may affect EPA's authority under the various provisions of Subpart 1 would be on much surer footing if the reviewing court had the benefit of EPA's full explanation of how and why it has implemented the revised ozone standard in a particular way, after the completion of a relevant decisional process (including any required public notice and comment) that actually implements the standard.[28]

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[28] The Court has recognized that deferring review is appropriate where "the need for some further procedure, some further contingency of application or interpretation . . . serve[s] to make remote the issue which was sought to be presented to the Court." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 51-52 (1976) (Brennan, J., concurring) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 528 (1961) (Harlan, J., dissenting)); see, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-164 (1967) (interpretive rule not ripe for review). In this case, "[d]etermination of the scope * * * of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954). See *ACLU* v. *FCC*, 823 F.2d 1554, 1577 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Office of Communication of United Church of Christ* v. *FCC*, 826 F.2d 101, 106 (D.C. Cir. 1987).

The case for deferring review is especially strong here because the resolution of any tension between the various provisions in Subparts 1 and 2 may depend upon the circumstances of the particular nonattainment area at issue. See, *e.g.*, Pet. App. 40a-41a (expressing concern regarding the interplay and future application of Sections 172(a) and 181(a)(1) on Los Angeles). Deferring review of those implementation issues would allow EPA the opportunity to work through the various implementation provisions in concrete settings, reconcile conflicts, make policy judgments, and apply its expertise as necessary to resolve ambiguities in the statute. See *Ohio Forestry*, 523 U.S. at 733-734; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984).

Judicial intervention at this point would also "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." *Standard Oil*, 449 U.S. at 242. Deferring review would facilitate future judicial review by reducing the issues to manageable proportions. The importance of a concrete setting for judicial review is underscored by the court's own confusion regarding EPA's interpretation, compare Pet. App. 43a-44a, with *id.* at 80a-81a and *id.* at 87a-88a, its reliance upon predicted future outcomes in particular areas, *id.* at 40a-41a, and the extreme breadth and lack of clarity of the court's ultimate conclusion that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," *id.* at 81a.

Finally, deferring review will not work substantial hardship. EPA's expression of its views in the preamble created

no obligations that adversely affect any parties' day-to-day operations, and the parties will have ample opportunity to bring their legal challenge when any harm is more immediate and certain. See *Lujan*, 497 U.S. at 891; *Ohio Forestry*, 523 U.S. at 733-734; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967).

III. THE COURT OF APPEALS IMPROPERLY RESTRICTED EPA'S AUTHORITY TO IMPLEMENT THE REVISED OZONE STANDARD

If this Court were to reach the merits of the court of appeals' decision respecting implementation, it should reverse that decision. The court of appeals correctly upheld EPA's authority to revise the ozone NAAQS, and it correctly concluded that the CAA requires EPA to designate all areas of the Nation as attainment, nonattainment, or unclassifiable areas for the revised standard. Pet. App. 34a-37a. The court erred, however, in concluding that EPA could not enforce a more protective ozone standard in those designated areas. See *id.* at 37a-44a. On rehearing, the court modified its views and concluded that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." *Id.* at 81a. Judge Tatel explained in his partial concurrence that the panel's revised decision allows EPA to enforce its revised ozone standard under Subpart 1 in an area only after that area attains the one-hour standard under Subpart 2. *Id.* at 89a (Tatel, J., concurring). But even under that view, the court of appeals' decision is incorrect.

As we explain below, EPA reasonably interprets the CAA to require that EPA implement a revised ozone standard under Subpart 1. The revised NAAQS is a *National* Ambient Air Quality Standard that should apply throughout the entire Nation, for all members of the public, including those that reside in areas that do not currently attain the one-hour standard. There is no warrant for categorically

requiring that EPA ensure compliance with the very one-hour ozone standard that it found inadequate to protect public health before it can require efforts to attain the more protective revised ozone NAAQS.

A. The Clean Air Act Authorizes EPA To Implement The Revised Ozone NAAQS Under Subpart 1 Of Part D

Title I of the CAA, 42 U.S.C. 7401-7515 (1994 & Supp. III 1997), governs the promulgation and implementation of all NAAQS, and it directs that the NAAQS be attained "as expeditiously as practicable." 42 U.S.C. 7502(a)(2), 7511(a)(1). Part A expressly requires EPA to reconsider and, if appropriate, revise the NAAQS—including the pre-existing one-hour ozone standard—every five years. 42 U.S.C. 7409(d)(1); Pet. App. 34a. Subpart 1 of Part D, which governs implementation for "Nonattainment Areas in General," sets out specific provisions for implementing revised NAAQS. 42 U.S.C. 7502(a)(1). It follows that EPA's revised ozone NAAQS would be subject to implementation under Subpart 1. The court of appeals' counter-intuitive conclusion —that the revised ozone NAAQS must be implemented in conformity with Subpart 2, which addresses the former ozone NAAQS—conflicts at the outset with the basic framework of the Act.

Subpart 1's specific language reveals that the court's construction is wrong. Section 172(a) establishes classifications and attainment dates for all areas designated nonattainment "pursuant to section [107(d)] with respect to any * * * revised standard, including a revision of any standard in effect on November 15, 1990." 42 U.S.C. 7502(a)(1)(A). Section 172(a)(1)(A)'s reference to "any" revised standard includes a revision of the one-hour ozone standard, because that standard was "in effect on November 15, 1990." See 40 C.F.R. 50.9 (1990). Thus, Section 172(a), on its face, makes clear that Subpart 1 governs the selection of classifications and attainment dates for a revised ozone NAAQS.

The court of appeals questioned that interpretation because Sections 172(a)(1)(C) and 172(a)(2)(D) provide that EPA's classification and attainment date-setting authority under Section 172(a) does not apply to "nonattainment areas for which classifications [or "attainment dates"] are specifically provided under other provisions of [Part D]." 42 U.S.C. 7502(a)(1)(C) and (a)(2)(D). See Pet. App. 37a. The court of appeals noted that Section 181(a)(1), in Subpart 2 of Part D, provides that "each area designated nonattainment for ozone pursuant to [Section 107(d)]" is to be classified and given an attainment date under its Table 1. 42 U.S.C. 7511(a)(1). See Pet. App. 38a. In the court's view, Section 181(a)(1) dictates that all areas that are designated as nonattainment for ozone under Section 107(d), including areas designated under the revised ozone NAAQS, are subject to Subpart 2's provisions. *Id.* at 38a-39a. Congress, however, adequately answered the court's concern over those seemingly competing references.

Section 181(a)—which is contained in Subpart 2 of Part D—"specifically provide[s]" classifications and attainment dates for only a particular subset of ozone "nonattainment areas." Section 181(a)'s caption states that the Section provides "Classification and attainment dates for *1989 nonattainment areas*." 42 U.S.C. 7511(a) (emphasis added). The 1989 nonattainment areas are, of course, the areas that were subject to the *one-hour ozone standard* then in force. Congress enacted Subpart 2 out of concern over the continuing nonattainment of the one-hour ozone standard that existed when it enacted the 1990 Amendments. It plainly crafted Section 181(a)(1) to address that specific problem. The title of Section 181(a) clarifies that Section's reach and resolves any confusion about whether Subpart 2 governs implementation of the revised ozone NAAQS. See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388-389 (1959).

The court of appeals' contrary conclusion would lead to unworkable and absurd results. For example, Section 181(a)(1) sets attainment dates and classifications based on an area's "design value," which is an air quality measure that specifically applies to the one-hour ozone standard that was in existence in 1990. See 42 U.S.C. 7511(a)(1).[29] It would make no sense—and, indeed, would be impossible—to classify areas and set their attainment dates for the revised NAAQS's eight-hour standard using an air quality measurement based upon one-hour averaging. The eight-hour NAAQS rests on an entirely different averaging methodology, statistical form, and concentration. See 40 C.F.R. 50.10 & Pt. 50 App. I, ¶¶ 2-3.

In addition, Section 181(a) calculates attainment dates for areas based upon a fixed number of years from 1990. See 42 U.S.C. 7511(a)(1) (Table 1). Section 181(a)(1) makes reference to 1990 because it establishes attainment dates for the "1989 nonattainment areas," which had not attained the one-hour ozone standard at the time of enactment of the 1990 Amendments. That timetable makes no sense in calculating attainment dates for a revised NAAQS. Indeed, many of Section 181(a)(1)'s attainment dates, including those for "marginal," "moderate," and "serious" nonattainment areas, have already passed. See 42 U.S.C. 7511(a) (Table 1).[30]

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[29] See H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 197 (1990). ("The primary ozone standard, established to protect human health, is a daily maximum hourly concentration of 0.12 parts per million (ppm) [*i.e.*, the one-hour ozone standard]. Compliance with the ozone standard is evaluated on the basis of a 'design value,' which is the fourth highest one-hour ozone reading over three years."). The court of appeals correctly noted this fact. See Pet. App. 32a n.6.

[30] The text of Section 181(b), 42 U.S.C. 7511(b), provides further evidence that Section 181 applies only to the implementation of the one-hour standard. Section 181(b) recognizes that areas initially designated shortly after enactment of the 1990 Amendments as "attainment" areas for the one-hour ozone standard may be redesignated as "nonattainment" if, for example, air quality in the area deteriorates. See 42 U.S.C.

In light of those considerations, Section 181(a)(1) cannot reasonably be construed to have "specifically provided" classifications and attainment dates for the eight-hour ozone standard. Rather, the text and context of Section 181(a) indicate that Congress intended Section 181(a)(1) to provide classifications and attainment dates only for "1989 nonattainment areas" that had been designated under the then-current one-hour ozone standard. See 42 U.S.C. 7407(d)(1)(C) and (4)(A). EPA's view that Congress intended EPA to implement the revised NAAQS under Subpart 1 and to implement the former NAAQS under Subpart 2 represents, at a minimum, a permissible and reasonable accommodation of the provisions entrusted to the agency's care. See, *e.g.*, *Chevron*, 467 U.S. at 842-845.

B. Delaying Implementation Of The Revised NAAQS Until The Previous Standard Is Attained Conflicts With The Clean Air Act's Requirement That All NAAQS Be Attained "As Expeditiously As Practicable"

The court of appeals also erred in its apparent conclusion that EPA cannot implement the revised ozone NAAQS in an area until that area has had an opportunity to meet the attainment dates for the one-hour ozone standard. See Pet. App. 89a. The court overlooked that the attainment dates set out in Section 181(a)(1) establish the maximum period of time allowed for attainment. See 42 U.S.C. 7511(a)(1). Both

7407(d)(3). Section 181(b) allows for adjustment of the attainment date set out in Section 181(a)(1)'s "Table 1" in that circumstance. See 42 U.S.C. 7511(b). Section 181(b) makes no provision, however, for using Table 1 if EPA promulgates a revised ozone standard and designates an area as "nonattainment" under the revised standard. Section 181(b) expressly applies only to areas that were initially designated as "attainment" for the one-hour ozone standard pursuant to 42 U.S.C. 7407(d)(4) and are later redesignated as "nonattainment" for that standard under 42 U.S.C. 7407(d)(3). See 42 U.S.C. 7511(b). Section 181(b) does not apply to designations for revised NAAQS, which are made under 42 U.S.C. 7407(d)(1).

Subpart 1 and Subpart 2 require that all areas attain the NAAQS "as expeditiously as practicable." CAA §§ 172(a)(2), 181(a)(1), 42 U.S.C. 7502(a)(2), 7511(a)(1); see H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. at 1, at 229; S. Rep. No. 228, 101st Cong., 1st Sess. 37 (1989). EPA accordingly is justified in concluding that it should implement the revised ozone standard without delay throughout the Nation in accordance with the timing provisions set out in Subpart 1. 42 U.S.C. 7502(a)(2).

The court of appeals expressed concern that a practical conflict could conceivably arise for the Los Angeles area between Subpart 1's deadline to attain the revised ozone standard and Subpart 2's attainment date for the one-hour ozone standard. See Pet. App. 41a. It is entirely reasonable, however, for Congress to require that, once EPA determines that a revised NAAQS is necessary to protect public health, the revised NAAQS should be attained without avoidable delay notwithstanding the timetable that Congress envisioned for the standard then in effect.[31]

Moreover, the court of appeals has overstated the practical problem that the revised NAAQS would pose. As we have noted, the deadlines for attainment in Section 181(a)(1) are only outer time limits for attaining the one-hour standard. See 42 U.S.C. 7511(a)(1). Los Angeles would be required to attain the revised NAAQS under Subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard. Compare CAA § 172(a)(2), 42 U.S.C. 7502(a)(2), with CAA § 181(a)(1) and (5), 42 U.S.C. 7511(a)(1) and (5). That situation, however, does not necessarily pose any practical problems. For

[31] The court of appeals' concerns may have arisen from a mistaken belief that it is unusual for areas to be subject to more than one NAAQS at any given time. To the contrary, it is common for an area to be subject to simultaneous implementation of two or more NAAQS, including two NAAQS governing the same pollutant. See, *e.g.*, 40 C.F.R. 50.4(a)-(b), 50.8(a)(1)-(2).

example, it may be "practicable"—and preferable from an implementing State's perspective—to achieve both the one-hour ozone standard and the revised ozone standard at approximately the same time. There is no reason to believe that Congress intended to preclude that approach.

In any event, the question of how to reconcile any competing compliance deadlines is clearly the type of issue that should first be addressed by EPA through future final action under the implementation process, including any required public notice and opportunity for comment. EPA's determinations can then be subject to judicial review in the appropriate court of appeals. See 42 U.S.C. 7607(b)(1). To the extent that there is tension between Subparts 1 and 2, it will be up to EPA to harmonize the applicable provisions, and the courts must defer to EPA's reasonable judgment on the matter. *Chevron*, 467 U.S. at 845. Those issues, however, are properly reserved for another day. Regardless of how those provisions may ultimately be applied, they certainly do not justify the court of appeals' conclusion that Congress prohibited EPA from implementing the revised ozone standard in an area until it attains the very standard that EPA found was not adequate to protect public health.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

Excerpts From Federal Register Notice: National Ambient Air Quality Standards For Ozone; Final Rule (62 Fed. Reg. 38,856 (1997))

1. In discussing its jurisdiction to review EPA's implementation of the eight-hour ozone NAAQS (Pet. App. 77a-78a), the court of appeals cited the following passage from the preamble of the Federal Register Notice describing EPA's Final Rule: National Ambient Quality Standards For Ozone:

D. 1990 Act Amendments

Contrary to the view expressed in some public comments, EPA maintains that the provisions of subpart 2 of Part D of Title I of the Clean Air Act, enacted in 1990, do not preclude EPA from revising the O_3 standard. The provisions of subpart 2 simply do not limit EPA's clear authority under section 109 to revise the standard.

The basic contention of the commenters is that because the provisions of subpart 2 are linked to the current 1-hour, 0.12 ppm O_3 standard, they prohibit EPA from revising the O_3 standard. These provisions, however, do not lead to such a conclusion. Moreover, the view expressed in these comments ignores provisions indicating that Congress believed that EPA could revise the O_3 NAAQS.

At the outset, it should be noted that Congress expressly authorized EPA to revise any ambient air quality standard in section 109. That section, which requires EPA to review and revise, as appropriate, each NAAQS every 5 years, contains no language expressly or implicitly prohibiting EPA from revising a NAAQS. If Congress had intended to preclude EPA from reviewing and revising a NAAQS, which is one of EPA's

fundamental functions, Congress would have specifically done so. Clearly, Congress knew how to preclude EPA from exercising otherwise existing regulatory authority and did so in other instances. See section 202(b)(1)(C)(expressly precluding EPA from modifying certain motor vehicle standards prior to model year 2004); section 112(b)(2)(preventing EPA from adding to the list of hazardous air pollutants any air pollutants that are listed under section 108(a) unless they meet the specific exceptions of section 112(b)(2)); section 249(e)(3), (f) and section 250(b)(limiting EPA's authority regarding certain clean-fuel vehicle programs). No such language was included in either section 109 or elsewhere in the Act and no such implication may properly be based on the provisions of subpart 2 of Part D of Title I.

Second, other provisions of the Act expressly contemplate EPA's ability to revise any NAAQS, and provide no indication that such ability is limited to standards other than those whose implementation is the subject of subparts 2, 3 and 4 of Part D. For example, section 110(a)(2)(H)(i) provides that SIPs are to provide for revisions "from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard * * *." Section 107(d)(1)(A) provides a process for designating areas as attainment, nonattainment, or unclassifiable "after promulgation of a new or revised standard for any pollutant under section 109 * * *." Section 172(e) addresses modifications of national primary ambient air quality standards. Finally, section 172(a)(1) expressly contemplates that EPA may revise a standard in effect at the time of enactment of the 1990 Clean Air Act Amendments. Section 172(a)(1)(A) provides EPA with authority to classify nonattainment areas on or after the designation of an area as nonattainment with respect to "any revised standard, including a revision of any

standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990." Plainly, Congress had no intention of prohibiting EPA from revising any of the ambient standards in effect at the time of the enactment of the 1990 amendments.

Third, the provisions of subpart 2 of Part D do not support the contention that they somehow preclude EPA from exercising its authority to revise the NAAQS under section 109. The fact that Congress laid out an implementation program for the O_3 standard existing at the time of the 1990 amendments in no way suggests that Congress intended to preclude EPA from exercising the authority it provided EPA to revise the NAAQS when the health data on which EPA bases such decisions warranted a change in the standard. Contrary to this contention, section 181(a) does not preclude the designation of areas as nonattainment for O_3 that have design values less than 0.121 ppm. EPA has designated as nonattainment numerous areas whose design value was less than 0.121 ppm, but which violated the existing 1-hour, 0.12 ppm O_3 standard. These areas, referred to as "nonclassifiable nonattainment areas," include "submarginal" areas (i.e., O_3 nonattainment areas with design values below 0.121 ppm), (See 57 FR 13498, 13524-27, April 16, 1992). These areas include areas that were designated nonattainment prior to the 1990 amendments and whose nonattainment designation Congress required to be continued after 1990. See section 107(d)(1)(C)(i). Clearly, Congress did not prohibit the designation of areas as nonattainment for O_3 with design values below 0.121 ppm; in fact, in some cases, Congress required it. Furthermore, the position advanced by the commenters would mean that, in effect, Congress in the 1990 amendments legislatively revised the then-existing 1-hour, 0.12 ppm O_3 standard to a 0.121 ppm standard. There is no indication that Congress intended to do that.

In addition, the fact that Congress directed EPA to use "the interpretation methodology issued by the Administrator most recently" before the date of the enactment of the Clean Air Act Amendments of 1990 in the context of subpart 2 does not add any support to the commenters' position; it merely shows that Congress intended the existing 1-hour, 0.12 ppm standard to be implemented in a specified way, not that Congress intended to preclude EPA from using its otherwise applicable authority to revise the standard.

The EPA also disagrees with the contention that sections 172(a)(1)(C) and (a)(2)(D), which provide that the general classification and attainment date provisions of section 172 do not apply to areas for which classifications or attainment dates "are specifically provided under other provisions of this part," support the conclusion that Congress intended to prohibit EPA from revising the O_3 standard. These provisions simply mean that where Congress elsewhere provided for specific classifications and attainment dates, as in the case of subpart 2 regarding the 1-hour, 0.12 ppm standard, EPA is not to modify those classifications or dates. The EPA is not purporting to do this. These provisions do not lead to the conclusion that because Congress established them for the O_3 standard in effect at the time of the 1990 amendments, Congress meant that EPA could not revise that standard in order to appropriately protect public health.

EPA does not accept the thesis that revising the O_3 standard forces EPA to violate other provisions of the Act and, therefore, is not an "appropriate" revision of the standard under section 109. Revising the O_3 standard in accordance with the language of section 109 does not result in EPA violating any provision of the Act. On the other hand, a determination by EPA that the O_3 standard should not be revised, even though EPA concludes that it

needs to be revised to protect public health with an adequate margin of safety, would violate section 109.

Also, EPA does not believe that carrying out the provisions of section 109 to set a new O_3 standard to protect public health with an adequate margin of safety somehow "risks undermining both perceptions and reality of the functioning of our democratic form of government." EPA is merely implementing the words of the Clean Air Act, a statute passed by the Congress and signed by the President. To refuse to revise the standard notwithstanding the need to protect public health as enunciated in section 109 would thwart the objectives of those who passed and signed the Clean Air Act on behalf of the American public.

Finally, for the reasons stated above, EPA's analysis of its ability to implement the revised O_3 standard under the provisions of subpart 1 of Part D of Title I does not support the view that Congress prohibited EPA from revising the standard. Congress clearly specified an approach to the implementation of the 1-hour, 0.12 ppm O_3 standard in the provisions of subpart 2 of Part D. EPA believes that the clear and express linkage of that approach to the 1-hour, 0.12 ppm standard indicates that it may implement a revised O_3 standard in accord with the general principles of subpart 1 of Part D, as informed by the no-backsliding principle embodied in section 172(e). That Congress directed specifically how EPA and the States should implement the 1-hour, 0.12 ppm O_3 standard does not carry with it the implication that Congress intended to prohibit EPA from exercising its otherwise clear and express authority to revise that standard in order to carry out one of its fundamental missions, the establishment of ambient air quality standards to protect public health with an ample margin of safety. If Congress had intended to prohibit EPA from exercising such a

fundamental authority it would have clearly specified (as it did in other instances) that EPA could not do so.

The EPA also disagrees with the contention that a revised O_3 standard may not be implemented for so long as the current 1-hour, 0.12 ppm O_3 standard remains in effect. The fact that the provisions of subpart 2 of Part D are focused on the implementation of the current standard does not mean that, if a new or revised O_3 standard is promulgated pursuant to section 109, the new standard could not simultaneously be implemented under the provisions of section 110 and subpart 1 of Part D, which apply regardless of the criteria pollutant of concern. There is no language in sections 181 or 182 that precludes the implementation of a different standard under other authority; those provisions simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard. EPA further notes that it has historically had more than one primary standard for criteria pollutants (e.g., annual and 24-hour PM_{10} and sulfur dioxide standards, and 8-hour and 1-hour CO standards) and believes that had Congress wanted to preclude EPA from implementing two primary O_3 standards simultaneously it would have expressly precluded EPA from doing so. Thus, EPA does not believe that it must repeal the 1-hour, 0.12 ppm O_3 standard before it can promulgate and implement a new primary O_3 standard.

62 Fed. Reg. 38,884-38,885 (1997).

2. The preamble of the Federal Register Notice also describes EPA's separate final rule, 40 C.F.R. 50.9(b), respecting future enforcement of the one-hour ozone NAAQS. The preamble contains the following passage, which provides an additional discussion of implementation of the ozone NAAQS:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and

recommendations of CASAC, public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

The 8-hour, 0.08 ppm primary standard will be met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentration is less than or equal to 0.08 ppm. Data handling conventions are specified in a new Appendix I to 40 CFR part 50 as discussed in Unit VI below.

In the proposal, EPA proposed that the revocation of the existing 1-hour O_3 standard be delayed for certain purposes until EPA had approved State Implementation Plans to implement the new 8-hour O_3 standard. EPA had proposed continuing the applicability of the 1-hour standard in this way in order to facilitate continuity in public health protection during the transition to a new standard. (See Memorandum from John S. Seitz to Mary D. Nichols, November 20, 1996; Docket No. A-95-58, item II-B-3.) Also, at the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996) under which the provisions of subpart 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.

In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the

provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.

To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should remain applicable to areas that are not attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

62 Fed. Reg. 38,873 (1997).